United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

Affidavit

77-4070

To be argued by
RICHARD J. LEON

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-4070

MARCELLO JOAQUIN CASTRO-CACERES,
Petitioner,

—against—

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

ON PETITION FOR REVIEW FROM THE
BOARD OF IMMIGRATION APPEALS

BRIEF FOR RESPONDENT

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-4070

MARCELLO JOAQUIN CASTRO-CACERES,
Petitioner,

—against—

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

BRIEF FOR RESPONDENT

Preliminary Statement

Pursuant to Section 106 of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1105a, Marcello Joaquin Castro-Caceres ("Castro"), petitions this Court for review of that part of a final order of deportation entered by the Board of Immigration Appeals ("Board") on January 25, 1977 which denied his application for withholding of deportation under Section 243(h) of the Act, 8 U.S.C. § 1254(h). Castro contends that the Board's decision should be reversed because its denial of his application constituted an abuse of discretion.

Issue Presented

Whether The Board Of Immigration Appeals's Denial Of Petitioner's Application For Withholding Of Deportation Constituted An Abuse Of Discretion.

Statement of Facts

The petitioner is a thirty year old native and citizen of Chile (AR. 48),[1] who entered this country on July 9, 1969 as a nonimmigrant crewman[2] awaiting his ship (AR. 19). Although only authorized to remain in the United States for 29 days (AR. 57), he failed to depart and was not located and taken into custody by agents of the Service until May 10, 1976. The Service then commenced deportation proceedings against him by issuing an "Order to Show Cause, Notice of Hearing, and Warrant for Arrest" charging him with violating Section 241(a)(2) of the Act, 8 U.S.C. § 1251(a)(2) by overstaying his permitted entry (AR. 57). Castro was released under a $5500 bond.

On the next day Castro applied to the Service's District Director for political asylum pursuant to 8 C.F.R. § 108.1 (AR. 48-51), thereby causing a temporary suspension of his deportation proceedings.[3] In his appli-

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[1] References preceeded by the letters "AR" are to the certified administrative record previously filed with this Court.

[2] The statutory definition of a non-immigrant crewman is found in Section 101(a)(15)(D) of the Act, 8 U.S.C. § 1101(a)(15)(D).

[3] Under 8 C.F.R. § 108 an alien may apply for asylum at any stage of his deportation proceedings. Subsection 108.2 specifically provides that applications may be classified as clearly meritorious, clearly lacking in substance, or in between these extremes. However, even if an alien's application is denied immediately by the District Director because it is clearly lacking in substance, the

[Footnote continued on following page]

cation form, completed in the presence of an immigration officer and under oath (AR. 51), he stated as his sole reason for asylum that as a former "member" of the Communist Party in Chile he "could be persecuted" upon returning (AR. 50).

Based on this unsubstantiated general assertion, the District Director denied his application (AR. 51) on May 13, 1976 concluding after review that it was "clearly lacking in substance" (AR. 53). However, pursuant to 8 C.F.R. § 108.2, he forwarded a copy of Castro's application to the State Department's Director of Refugee and Migration Affairs, requesting a recommendation on Castro's application (AR. 53). Since the District Director did not receive a response from the State Department within 30 days,[4] he reactivated Castro's deportation proceedings pursuant to his authority under 8 C.F.R. § 108.2.

On July 19, 1976, Castro appeared at his deportation hearing with counsel before Immigration Judge Anthony DeGaeto. After conceding his deportability on the charge

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District Director must allow the State Department at least 30 days to present its view on the alien's application before enforcing, if it exists, an outstanding order of deportation. As a result of this regulation, the deportation proceedings of all aliens, regardless of whether they have been found deportable by an Immigration Judge in a hearing, are temporarily suspended as soon as their application for asylum is submitted, as provided in Section 1081.1 (f)(2) of the Service's Internal Operations Instructions at pages 618.15-618.16 (2-9-77).

[4] The District Director's request for a recommendation from the State Department was dated May 14, 1976 (AR. 53). Although the State Department's response is dated July 2, 1976 (AR. 46), it was not received by the Service until August 20, 1976, three weeks after Castro's deportation proceeding. However, even if it had been available, its recommendation relating to Castro's application for asylum would not have been admissible to assist the Immigration Judge in determining whether or not to withhold his deportation. *Zamora* v. *Immigration and Naturalization Service*, 534 F.2d 1055, 1062-63 (2d Cir. 1976).

stated in the May 10, 1976 "Order to Show Cause" [5] (AR. 18), Castro submitted (AR. 20) an application for withholding of his deportation under Section 243(h) of the Act, 8 U.S.C. § 1254(h) (AR. 56). However, since his attorney hoped to submit additional evidence in support of this application, Judge DeGaeto adjourned the proceedings for ten days (AR. 21).

On July 30, 1976,[6] Castro's proceedings were reconvened before Judge DeGaeto (AR. 22). At that time an affidavit by Castro (AR. 52) was submitted by his attorney as the only non-testimonial evidence in support of his request for withholding of deportation. To supplement this document Castro's attorney questioned him at length during direct examination about his political involvement in Chile prior to entering the United States. The thrust of this testimony, as supplemened by the affidavit, was Castro's assertions that: (1) he had worked for the Liberal Party in Chile giving speeches to engender support for their cause (AR. 28-29); (2) he never was a member of the Communist Party in Chile, even though

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[5] The "Order to Show Cause" issued by the Service on May 10, 1976 was amended on June 4, 1976 by substituting the allegation that Castro was admitted as a nonimmigrant crewman for 29 days to await his ship, with a new allegation contending that he was only admitted as a nonimmigrant in transit as defined in Section 101(a)(15)(C), 8 U.S.C. § 1101(a)(15)(C), for one day (AR. 55). During Castro's initial deportation hearing, however, his attorney demonstrated to the Court's satisfaction that his client had entered on a C-1 visa as a nonimmigrant crewman and therefore the Service's trial attorney withdrew the amendment to the Order to Show Cause (AR. 19-20). Therefore, Castro's proceedings continued with respect to the original charge.

[6] Although page 22 of the certified administrative record states the date of Castro's proceeding as June 30, 1976, it is apparent from reading pages 20, 21, 44 and the oral decision of Judge DeGaeto dated July 19, 1976 that this is a typographical error. June should read July.

he claimed to have been in his application for asylum to the District Director (AR. 28); (3) his wife, children and parents in Chile have never been persecuted by the present military government for his political beliefs (AR. 29); and (4) since he had been informed[7] that all members of the Liberal Party were killed or placed in concentration camps by the present government, he concluded that he would be persecuted for his prior affiliation with it (AR. 28-29). However, no testimonial or other evidence was introduced to substantiate these assertions.

Based on this evidence, the Immigration Judge analyzed the testimony and rendered his decision (AR. 12-16). Judge DeGaeto concluded that Castro's ". . . claim is solely [based] on [the] speculation that he would be persecuted if he returned to Chile because of these alleged speeches . . ." and, therefore, that Castro did not meet his legal burden of showing a "clear probability of persecution" by demonstrating that he would be ". . . singled out as an individual by the governmental authority and suffered [sic] persecution therefrom . . ." (AR. 14-15). Consequently, the Judge denied his application under Section 243(h). However, he did grant Castro's alternative request for voluntary departure[8] (AR. 15).

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[7] Castro stated in his testimony that his father had informed him, in a series of letters he had since destroyed, about the persecution that had befallen his former associates (AR. 41). It is *curious*, at best, why he would destroy the only documents which arguably could have assisted him in proving his need for political asylum.

[8] See Section 244(e) of the Act, 8 U.S.C. § 1254(e), and 8 U.S.C. § 244. This relief can be granted if the alien establishes that he is willing and has the immediate means with which to depart promptly from the United States. If granted it removes the stigma of an order of deportation from the alien's record and thus facilitates any future lawful reentry into this country which he might wish to make. See Section 212(a)(17) of the Act, 8 U.S.C. § 1182(a)(17).

On August 5, 1976 Castro appealed Judge DeGaeto's decision to the Board, contending that it was unwarranted because "sufficient evidence" was introduced to grant his request for withholding of deportation (AR. 10). On January 25, 1977 the Board issued a decision dismissing Castro's appeal and upholding the Judge's decisions (AR. 4). In its opinion, the Board found that Castro had ". . . failed to show a well-founded fear that his life or freedom would be threatened in Chile on account of his . . . political opinion", and, therefore, concluded that Castro "would not be persecuted if deported to Chile" (AR. 4). Additionally, it noted Castro's own admission that none of his family in Chile had been persecuted and the inconsistency of his sudden switch in reliance from his purported membership in the Communist Party to the Liberal Party as the basis for his fear of political persecution (AR. 4). Based on this decision and pursuant to the voluntary departure previously granted by Judge DeGaeto, the Board ordered that Castro be permitted to voluntarily depart within 31 days and be deported thereafter if he failed to do so (AR. 4).

Castro did not voluntarily depart within the 31 days. Accordingly, on March 1, 1977, a warrant of deportation was issued by the Service (AR. 1). Castro filed a petition with this Court on March 15, 1977 seeking to set aside the Board's decision denying his 243(h) application. Consequently, Castro has remained in the United States pursuant to the automatic statutory stay of deportation which accompanies every petition for review filed pursuant to Section 106(a)(3) of the Act, 8 U.S.C. § 1105a (a)(3).

Relevant Statute

Immigration and Nationality Act, 66 Stat. 163 (1952), as amended:

Section 243, 8 U.S.C. § 1253——

* * * * *

(h) The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion or political opinion and for such period of time as he deems to be necessary for such reason.

Relevant Regulation

Title 8, Code of Federal Regulations (C.F.R.) § 242.17

242.17 Ancillary matters, applications

* * * * *

(c) Temporary withholding of deportation. * * * The respondent shall be advised that pursuant to Section 243(h) of the Act he may apply for temporary withholding of deportation to the country or countries specified by the special inquiry officer and may be granted not more than ten days in which to submit his application. The application shall consist of respondent's statement setting forth the reasons in support of his request. The respondent shall be examined under oath on his application and may present such pertinent evidence or information as he has readily available. The respondent has the burden of satisfying the special inquiry officer that he would be subject to persecution on account of race, religion or political opinion as claimed. * * *

ARGUMENT

The Board Of Immigration Appeals's Decision To Deny Petitioner's 243(h) Application Constitutes A Proper Exercise Of Discretion.

A. General Background

The United States Supreme Court and this Circuit have continually and steadfastly affirmed Congress' plenary power to establish criteria for the admission and expulsion of aliens. *Kliendienst* v. *Mandel*, 408 U.S. 753, 766 (1972). Pursuant to this authority Congress enacted Section 243(h) of the Act, 8 U.S.C. § 1253(h), which permits the Attorney General [9] in his discretion to withhold deportation when "in his opinion the alien would be subject to persecution on account of race, religion or political opinion." *Muscardin* v. *Immigration and Naturalization Service*, 415 F.2d 865, 866 (2d Cir. 1969); *United States ex rel. Dolenz* v. *Shaughnessy*, 206 F.2d 392, 394-95 (2d Cir. 1953).

To be eligible for consideration under the provisions of Section 243(h) of the Act, an alien must submit an application to the Immigration Judge at his deportation hearing which requests this relief and sets forth the reasons why it should be granted.[10] The alien has the burden of proof to demonstrate that his application warrants favorable consideration. 8 C.F.R. § 242.17(c); *Chen* v. *Foley*, 385 F.2d 929, 934 (6th Cir. 1967), *cert.*

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[9] Section 101 of the Act, 8 U.S.C. § 1101, empowers the Attorney General to delegate his responsibility. Pursuant to this power the Attorney General has delegated this responsibility to the Immigration Judge, 8 C.F.R. § 242.8(a), and to the Board of Immigration Appeals, 8 C.F.R § 3.1.

[10] *See* 8 C.F.R. § 242.17(c).

denied, 393 U.S. 838 (1968); *Khalil* v. *Immigration and Naturalization Service*, 457 F.2d 1276, 1277 (9th Cir. 1972). In the context of Section 243(h), the alien is not only required to show a "*clear probability of persecution*" in the country designated for his deportation, but also that this persecution would result solely from religious, racial or political reasons. *Cheung Kai Fu* v. *Immigration and Naturalization Service*, 386 F.2d 750, 753 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968). *See also Hyppolite* v. *Immigration and Naturalization Service*, 382 F.2d 98, 100 (7th Cir. 1967); *Lena* v. *Immigration and Naturalization Service*, 379 F.2d 536, 538 (7th Cir. 1967). A mere showing of persecution in a particular country, without substantial proof as to the reasons behind the persecution or its relationship to the applicant, is insufficient to warrant favorable discretionary action under Section 243(h). *Paul* v. *Immigration and Naturalization Service*, 521 F.2d 194, 199-201 (5th Cir. 1975); *Zamora* v. *Immigration and Naturalization Service*, 534 F.2d 1055, 1063 (2d Cir. 1976); *Cheng Kai Fu* v. *Immigration and Naturalization Service*, *supra* at 753; *Hyppolite* v. *Immigration and Naturalization Service*, *supra* at 100.

B. The Standard of Review

In reviewing an exercise of the discretionary authority under Section 243(h) of the Act, the scope of review for this Court is extremely narrow. *Muscardin* v. *Immigration and Naturalization Service*, *supra* at 866. It is limited to a determination of whether the decision in question manifests an abuse of discretion. *MacCaud* v. *Immigration and Naturalization Service*, 500 F.2d 355, 359 (2d Cir. 1974); *Zupicich* v. *Esperdy*, 319 F.2d 773, 774 (2d Cir. 1973). Accordingly, this Court is precluded from substituting its judgment for that of the Board unless the Board's determination is found to be

without any rational explanation, to depart inexplicably from established practices, or to rest on an impermissible basis. *Wong Wing Hang* v. *Immigration and Naturalization Service*, 360 F.2d 715, 719 (2d Cir. 1966); *Vardjan* v. *Esperdy*, 197 F. Supp. 931 (S.D.N.Y. 1961), *aff'd*, 303 F.2d 279 (2d Cir. 1962). It is against this standard that petitioner's claim of abuse of discretion must be judged to ascertain whether he sustained his burden of showing a clear probability that he would be persecuted on political grounds if returned to Chile.

C. The Petitioner Failed To Establish A Clear Probability Of Political Persecution

From the facts in this case it is evident that the Board did not abuse its discretion. It amply supported its decision with reasons, and was therefore neither arbitrary nor capricious. In fact, both the Board and the Immigration Judge followed the well-established rule: that withholding of deportation is warranted only where there is a clear probability of persecution of the particular alien. *Cheng Kai Fu* v. *Immigration and Naturalization Service, supra.*

Under 8 C.F.R. § 242.17(c), Castro had the burden of establishing that he would be subject to persecution. *MacCaud* v. *Immigration and Naturalization Service, supra.* He had to set forth the conditions relating to him personally which supported his anticipation of persecution. *Cheng Kai Fu* v. *Immigration and Naturalization Service, supra.* A review of the evidence submitted by Castro, in relation to this well established burden, reveals the insubstantial nature of his contentions.

In his testimony before Judge DeGaeto and in the affidavit he submitted, Castro presented the reasons which he believed qualified him for discretionary relief under

Section 243(h) of the Act. In summary these reasons were as follows: (1) Castro claimed that although not a *member* of the Liberal Party, he worked for it between 1966-1968 giving speeches weekly in order to rally support for the liberal party cause (AR. 39 and 52); (2) he stated that the present military government does not "recognize anyone with *liberal ideas*" (AR. 28) and he understands that consequently the Chilean government has persecuted since it came to power, all "leaders" of the Liberal Party, as well as, "certain other members" of the Liberal Party (AR. 52); (3) Castro claims that as a result of his speeches nine years ago he is known to "thousands of people" as having worked for the party (AR. 28); and (4) combining all of these "facts", Castro claims that he, like thousands of other Chileans, would be either assassinated or placed in a concentration camp (AR. 28). After considering his affidavit and testimony on both direct and cross-examination, Judge DeGaeto concluded that Castro's cumulative assertions were speculative and did not consequently establish a clear probability of persecution (AR. 15). The Board determined that this decision was "correct" (AR. 4).

Before evaluating each of these statements, it is important to note at the outset that Castro's failure to present any corroborative evidence to support these contentions entitled Judge DeGaeto to disbelieve his testimony and thereby precluded him from satisfying his burden under Section 243(h) of the Act. *Khahil* v. *Immigration and Naturalization Service*, *supra* at 537-38. Moreover, these statements, when viewed in relation to the total testimony, had inherent inconsistencies and were incomplete. As a result, both the credibility and substance of his testimony were undermined and therefore not reliable. An analysis of Castro's statements is most easily structured around four central questions: (1) *who* was he affiliated with politically; (2) *when* did he actively en-

gage in political activities; (3) *what* were the nature of his political actions and beliefs; and (4) *how* do those beliefs relate to the actions and policies of the present military government.

First, with respect to his political affiliation, Castro stated in his application for political asylum, completed under oath and in the presence of an immigration officer on May 11, 1976, that he had been a member of the Communist Party (AR. 49) and for that reason alone he would be persecuted by the government if he were to return to his homeland. Yet, six weeks later, July 6, 1976, he stated in an affidavit that he had never been "a member of, supporter of or associated with the Communist party" (AR. 52). He explained this discrepancy by inferring in his affidavit that since he had not read the statement in his May 11, 1976 application and therefore could not be held accountable for it. However, this inference was inconsistent with his testimony in his deportation proceedings before Judge DeGaeto four weeks thereafter when he acknowledged that: (1) he personally wrote all the answers on the application (AR. 34); and (2) understand what they meant in English (AR. 35). His only excuse at that time for these statements was that he could not spell ("write") the word Liberal Party in English (AR. 35). To say the least, Castro's credibility was understandibly shaken by the incongruity of these statements, made within a short period of time, and justified by such a frivolous reason when considering the critical importance of the information being sought. Castro, by his own words, failed to demonstrate that his assertions were believable.

Despite these inconsistencies, Judge DeGaeto, although noting the problem, assumed that Castro had never been affiliated with the Communist Party (AR. 15). However, when examining his involvement with the Liberal

Party, the Immigration Judge was presented with yet another inconsistency between Castro's affidavit and testimony. In his affidavit he stated that he worked for the Liberal Party "from 1966 to 1968" speaking on the average of "once a week." But when questioned on cross-examination regarding when he worked for the party, he was not certain how many speeches he made or how many years he made them (AR. 38-39). In fact, at one point it appeared that he worked for the party for less than one year (AR. 39). Accordingly, Castro's credibility and substantive support for his requested relief was further weakened.

Finally, Castro's testimony and affidavit are totally silent and thereby woefully incomplete with respect to the actual substantive nature of his alleged speeches and their relation to the political philosophy of the government now present in Chile seven years later. Neither Judge DeGaeto nor the Board on appeal thereafter had any indication of whether the ideology he purportedly advocated in 1968 is incompatible with and therefore threatening to that of the present government. Moreover, even assuming this were true, Castro's own admission that his children, wife and parents have never been persecuted, threatened or even interrogated by the Government because of his former speeches undercuts his alleged fear of being identified with and therefore persecuted for those beliefs. Surely it is far fetched to contend that a government committed to identifying and silencing all potential political dissidents would not *at least* interrogate the family of a former public advocate of such a cause in order to determine his whereabouts.

On the basis of this analysis of the record before the Immigration Judge and Board, it is respectfully submitted that the Board's decision denying petitioner's Section 243(h) application was a proper exercise of discretion which should be affirmed by this Court.

CONCLUSION

The petition for review should be dismissed.

Dated: New York, New York
May 12, 1977

Respectfully submitted,

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AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Marian J. Bryant being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 12th day of May 1977 she served two copies of the within Appellee's Brief

by placing the same in a properly postpaid franked envelope addressed:

Barst & Mukamal
127 John Street
New York, New York 10038

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Marian J. Bryant

Sworn to before me this
12th day of May, 1977

Pauline P. Troia

PAULINE P. TROIA
Notary Public, State of New York
No. 31-4632381
Qualified in New York County
Commission Expires March 30, 1978